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No. 661

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

JOHN C. WEBB AND HELEN H. WEBB, *Petitioners*

v.

JOHN E. OXLEY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

JOHN C. WEBB
Pro se

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HELEN H. WEBB
Petitioners
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FRANKLIN PRESS, GAITHERSBURG, MD

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO.

JOHN C. WEBB and HELEN H. WEBB, his wife
Appellants

v.

JOHN E. OXLEY
Appellee

On Appeal from the Court of Appeals of Maryland

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Court of Appeals (p. ....) is reported as the Webbs vs. Oxley, 226 Md. 339-345 and was dated and entered in that Court on August 17, 1961. The verdict and judgment (p. E-3) were entered in the Circuit Court of Maryland for Montgomery County on November 3, 1960, and November 10, 1960, respectively, following a jury trial, November 2-3, 1960, in Oxley vs. the Webbs, No. 8405 Law.

JURISDICTION

This action was an appeal, under Maryland Rules of Procedure, from a verdict and judgment in favor of the appellee, in the full amount claimed as attorney's fees. He

had contracted to serve the appellants (as solicitor and barrister) in a federal land taking case, U.S. v. 72.71 acres, more or less, etc., and John C. Welch, et al., Civil Action No. 8628. This basic underlying trial was held in the U.S. District Court for the Maryland District, Chesnut, J., October 22-24, 1957.

The jurisdiction of this Court to review the opinion of the Court of Appeals of Maryland, and the verdict and judgment in the trial court there below, is conferred by U.S.C.A., Title 28, section 2072, and the Constitution of the United States, Amendments 5 and 14.

On November 7, 1961, an order extending the time to file this petition for Writ of Certiorari by 30 days, to and including December 15, 1961, was signed by Mr. Chief Justice Earl Warren.

On December 2, 1961, an order extending the time to file this petition for Writ of Certiorari by 30 days, to and including January 14, 1961, was signed by Mr. Chief Justice Earl Warren.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

(1) Did the Court of Appeals err in finding that the Circuit Court of Maryland for Montgomery County had jurisdiction to hear and to determine this case?

(2) Did the Court of Appeals err in finding that the trial court below did not err when it prevented the appellants from testing the expertness of the appellee by cross-examination against procedures set forth in any established legal texts, references or codes of ethics?

(3) Did the Court of Appeals err in determining that

the trial court (Pugh, J.) did not show prejudicial bias,

(a) in refusing to allow testimony by the appellant identifying the various sources refusing assistance in locating lawyers qualified to serve as counsel or expert witness or to provide other aid to their cause and the nature of such refusals?

(b) in asking the appellant, in the nature of stern cross-examination, certain questions relative to the nonpayment of fees to the appellee?

(c) in questioning the appellant as witness, and in similar tone and nature, if he did not know that the appellee could not withdraw as counsel during trial?

(d) in denying the admission of a sales contract, as an exhibit, by the appellants?

(e) in denying to the appellants the admission of certain orders and opinions of the federal trial court (Chesnut, J.) that were pertinent to the quality and timeliness of action by the appellee?

(4) Did the Court of Appeals err in finding that the verdict and judgment in the trial court below were not contrary to the evidence by reason of lack of timely motion therefor by the appellants at the trial?

STATUTES INVOLVED

Statute Title 28, section 2072 reads, in part: "The Supreme Court shall have power to prescribe by general rules, the forms of process, writs, pleadings and motions and the practice and procedures of the district courts of the United States in civil actions."

Amendment V. reads "No person shall—be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation."

Amendment XIV reads in part: "No state shall make or enforce any law which shall deprive any person of life, liberty, or property without due process of law, * *"

STATEMENT OF THE CASE

The United States, by court order of December 5, 1955, took certain land from the appellants by eminent domain. The land taken totaled 35.59 acres of a 202 acre farm. Thirteen acres were by fee simple and the remainder by easement consisting of the veto of any housing construction and assembly in excess of 25 persons. The total amount offered the appellants was $8,550 which was deposited into the Court. The taking was for a NIKE launching site. The location was about 2 miles north of Gaithersburg.

Negotiations, conducted with counsel, failed to mature. For various reasons the appellants discontinued services of this counsel, and withdrew, as an advance, the sum deposited by the Government with the Court.

The appellant endeavored to negotiate with the Government. Also, information was sought of the Department of Justice if any method of arbitration or settlement, with the aid of impartial informed arbitrators were available rather than trial. It was stated that nothing short of trial existed except for negotiation.

The appellant resumed negotiation. In qualification therefore, as official records show, he had conceived, developed and established the nature and tone of the con-

tracting procedures, and criteria, for educational services received by the Navy at various educational institutions. The administration of such contracts was his responsibility including the audit of periodic reports of expenditures leading to contract revisions. The War Department took measures to conform to this process as the Army Student Training Program was initiated in 1943. In 1946, the Veterans Administration took over both personnel and contracting concepts from the Navy. Expenditures exceeding $20,000,000,000 have been made with educational institutions guided by the concepts developed by the appellant.

The contracting procedures and terms of contract included (a) a tone set by the fact that Government and institutions needed each other and negotiations were conducted as between peers; (b) the institutions would be left as the government found them—free from harm or loss; (c) the government would receive educational services at cost but without using cost inspection; (d) the contract would include provisions for all aspects, including initial capital expenditures, operating costs, and liquidation expenses; (e) manner and terms by which capital items would be removed from or made available to the institutions; (f) periodic revision of contracts based upon cost report analysis; (g) contract terms arrived at upon the site, quickly formalized, with assurance of administrative measures for timely payments.

A board of appeal was established in 1943 to eliminate competition on a campus and to protect the institutions from arbitrary treatment by government in contract matters. This board, continued since, now reports to Congress rather than to an administrative bureau or office. Not one appeal has been made from a Navy contract, yet contract costs have been favorable.

As the Korean War started, a conference convened by the American Council on Education recommended to the Secretary of Defense, among other items, that the contracting procedures used during World War II be re-established, in the event that the services of the institutions were again required. This compares with hostility towards contracting, carried over from World War I, evident in 1941.

Despite this background of equitable negotiation experience, the appellant was unable to establish any basis of negotiation with the government on even the most modest of terms.

The services of the appellee, serving to pass on legal aspects of any papers arising from the negotiations, were extended to attorney of record in October, 1956. Terms of employment were formalized in a contract signed by the appellants on March 20, 1957, as preparations for trial, scheduled for shortly thereafter, were completed and agreements as to strategy had been mutually established.

Such terms included the condition that the appellants' case was to be based upon the Economic Survey of Montgomery and Prince Georges Counties, Maryland, as prepared by Homer Hoyt Associates and published in January, 1955. Hoyt predicted that Montgomery County would grow from a population of 248,000 in 1954 to 450,000 in 1980.

The improvement to the status and condition of Snouffer School Road, upon which the appellants' farm is located, was to be fully developed. This the appellant reserved as his exclusive project.

The appellee was to develop the facts entering into the sale of those farms near the appellants for possible use

should their sale have been under some degree of pressure and their usefulness as comparables be impaired thereby.

At no time did the appellee advise the appellants of Rule 71(a), FRCP, whereby commissioners could be appointed by the Court and a price determination made by those with competence in such matters in a rapidly changing market and thus avoid a jury trial where no such experience or skill was presumably to be found.

The government had appraised the farm of the appellants at $8,550 while the appraiser for the appellants had arrived at a figure of $43,000.

The appellants acquired a copy of a sales contract for a 388 acre farm next door, Hadley farm, between the owners and Harry Doyle. This sales contract was turned over to the appellee in September, 1957, to be used as evidence of the intended development of the farm as GI Housing.

Mr. A. Jasper Moore supplied the appellant, in September, 1957, with the information that Custards', Inc., had purchased Hadley farm at $700 an acre rather than $517 shown by the recorded deed. Moore, manager of Custards', stated that instead of Arthur Godfrey being the purchaser, as commonly supposed, and better for the purposes of the appellants, the purchaser was a syndicate of some ten business men. Half of them were competent to appear as expert witnesses in metropolitan Washington real estate matters. Thereafter, he stated that the president of Custards', C. Leo De Orsey had disapproved supplying the names for use at the trial. The appellee made no use of this information either to provide for modification or substantiation of the appraisals for the appellants—either as hearsay evidence or through the use of discovery.

The appellee expressed concern about the appellant testifying concerning the Snouffer School Road change in

status and scheduled improvements. Cause of concern was the possibility that the Government would raise the question of prior negotiations. The appellant stated that, despite such, he still intended to testify. He accumulated various newspaper clippings and official publications showing the nature of improvements, the time of their approval and manner of financing.

The appellant, observing that the appellee was making no progress in using the Hoyt report as the basis of the trial, volunteered that he was competent to testify thereon as a professional statistician. The appellee dismissed this competence without investigation or consideration.

The appellant had demonstrated his competence in the areas of forecasting and prediction as a budget officer of the Navy and as a professional statistician prior thereto in financial work. Official documents and publications show that he had established, by forecast, the numbers of enlisted and officer personnel required on active duty during the build-up period of World War II. These numbers increased from about 100,000 in 1940 to 1,300,000 in 1943. Personnel under instruction, funds for which activity were likewise largely the responsibility of the appellant, rose from a nominal number of about 3,500 in 1940 to 300,000 capacity in fiscal 1944. This included a capacity of about 80,000 in universities and colleges for the College Training Program alone. Annual appropriations prepared, justified and administered, increased from some $15,730,000 in fiscal 1940 to $554,000,000 in fiscal 1943. A budget officer requires adequate and timely planning. In the absence thereof, he must fill the vacuum. He requires mental facility and talents to view and operate objectively and concurrently with appropriations in some four to five different fiscal years. He must be quick to react to the total implications of a single

program change. He must be a line generalist rather than a specialist or money technicist.

The appellee attended a pre-trial conference on October 9, 1957, before Thomsen, C. J., in the District Court in Baltimore. The appellee comes from a jurisdiction which denies the use of pre-trial. He had no prior experience in such an eminent domain proceding in a federal court under Rule 16, FRCP. He failed to compensate for this lack of knowledge and experience either by reading the rule and available text, or by preparing brief and case law. He had not read the Rule prior to the trial on November 2, 1960, some three years after the need. He stated that he never prepared either brief or case law in any case.

His sole purpose in going to pretrial was to prevent the Government from using any mention of negotiations prior to the trial. Testifying that he had won the support of Judge Thomsen to this point, he stated that he continued to fear the use, nevertheless.

He did not discuss the various documents that were to be entered at the trial as exhibits nor the need for discovery measures to establish the information provided him as useable hearsay evidence or as real evidence.

The case came on for trial October 22-24, 1957. The Government claimed highest use of the Webb farm was as farmland, appraised compensation being $8,550 to $10,000. The Webb appraisal was about $43,000 and highest use as developmental land.

The appellee sought twice to introduce the sales contract as evidence. The trial court ruled that, as hearsay evidence, it couldn't be introduced until a proper background had been prepared. The second time, the appellee agreed with the court that the sale price had been already

introduced and that he had submitted the document only at the insistence of the appellant and not because it was needed. He was unaware then, as at the trial for his fees, that the contract which he held in his hands for over a month was valuable to show that the intent to purchase Hadley farm was for G.I. housing.

During the federal trial, the principal expert witness for the appellants sought to give the reasons why Hadley farm was the key comparable and how he had arrived at $43,000 as just compensation. The appellee did nothing to support this witness, E. L. Dieudonne, nor to protect the appellants, by objecting to the exclusion by the trial judge.

The Government attorney called upon Mr. Dieudonne or the appellee to produce the official documents establishing the official change in status of Snouffer School Road. The appellant had those books under his hand, at the left hand of the appellee, ready for introduction as he testified. They included newspaper stories and a chart of September 23, 1955, announcing changes in designation for Snouffer School Road from a rural to an arterial road. The plans were heard before the County Council on December 12, 1955, and approved in January, 1956. Also at hand were the approved budgets for financing the road construction. The plans called for a change from a two-car wide country gravel road to a paved road 24 feet wide, and a total right-of-way of some 70 feet. The change was in accord with the Hoyt prediction of an increase of 330% in population, served by the complex, of which Snouffer is a part, between 1950 and 1980 or about 10,000 families.

The appellee did not present the documents as requested. Neither did he call the appellant to the stand to testify in his own interests and as the appellant had stated he fully intended to do.

In climax, he suggested to the trial judge that Snouffer School Road was not a dirt road, as charged, but a gravel road.

Committed to examining Messrs. Clyde Thomas, Forest Walker and McKendree Fulks in readiness for the use of the sale of certain properties as comparables about which they had useable knowledge, the appellee made no attempt to develop their testimony as needed at the trial. Not only did he not take steps, that only he could do, but he stated in the trial below that he didn't have to examine anyone that the appellant had not brought into his office.

The appellant took Walker to Baltimore on November 23, 1957, at the request of the appellee, as a potential witness for showing the degree of compulsion behind the sale of his farm. His testimony was never developed nor used even though the sale of his farm next to Gaithersburg at some $300 an acre was used as a comparable by the Government.

The appellee did not compensate for his lack of knowledge or experience in federal eminent domain proceedings in that Court through either the retention or association of counsel with that experience, competence or talent.

The trial ended, the services of the appellee were terminated. Under new counsel, the appellants filed a motion for a new trial on November 1, 1957. This was denied by the trial court and reported as U.S. v. 72.72 acres, etc., John C. Webb, et al., 157 F Supp. 401. Affirmation followed the appeal, Webbs v. U.S., 276 F 2nd 669 and certiorari denied 388 U.S. 931.

The appellee, and succeeding counsel for the appellants, moved for a lien as attorneys' fees against judgment on August 28, 1958. The appellants contested the imposi-

tion of a lien on the basis of failure to receive professional service of a degree to warrant payment of the fees. The appellants offered to pay forthwith, in lieu of a lien, any amount that the trial court determined that they owed. The appellants argued that jurisdiction properly belonged in that court rather than an alien jurisdiction having different rules, customs and procedures. The trial court declined this jurisdiction on October 31, 1958, in overruling the motion and determining that a full judicial proceeding was required to determine the matter of quality of services and fees accordingly due. This overruling is reported as U. S. v. 72.71 acres etc. v. John C. Webb et al, 167 F Supp 312.

The appellants, in the meantime, filed a motion October 10, 1958, in proper person, for relief from final judgment on the basis of new evidence later adding "fraud upon the court" and "any other reason." An opinion and order overruling this motion was filed on May 1, 1959, and is reported as U.S. v. 72.71 acres of land etc., John C. Webb et al., 23 FRD 435. An appeal resulted in affirmation and is reported as The Webbs v. U.S. 273 F 2nd 416 and certiorari denied 364 U.S. 818.

The appellants, on order of court, withdrew $6,048 as an advance withdrawal from the clerk, on November 10, 1958.

The appellee filed a motion for summary judgment for attorney's fees in the Circuit Court of Montgomery County, entitled John E. Oxley vs. the Webbs, No. 8405 Law.

The appellants filed a motion on January 27, 1959, to amend the pleadings questioning the jurisdiction of the Circuit Court to consider the case and claiming that there was no abandonment of this question by reason of filing answers in the case. This motion pointed out that the trial court

ought to hear the case since it had the responsibility to maintain the competence of the members of that court and of discipline. This motion was overruled on February 13, 1959.

On March 20, notice was received that this case had been removed from the March 30, 1960, docket. The assignment clerk informed the appellant that the removal was to permit the appellee, a candidate for nomination and election as Circuit Court judge, to organize and conduct his campaign. It was later redocketed successively for October 7 and then November 2, 1960.

On March 21, 1960, the appellants filed a petition for a pretrial hearing which was denied as was a second petition filed August 31, 1960.

Depositions of Robert C. Baker, President of American Security and Trust Co., Washington, D.C.; Arthur Stanton Adams, President of the American Council on Education, Washington, D.C., were filed on October 31, 1960, and that of Robert B. Stewart, Vice-President and Treasurer of Purdue University and Vice President and General Manager of Purdue Research Foundation, was filed on November 1, 1960.

The trial below was held before a jury November 2-3, 1960, Judge Pugh presiding. During the cross-examination of the appellee by the appellant, the trial court prevented the appellant from testing the expertness of the appellee against any legal text or reference. The rulings were testing against Chapter 11, Preparation of the Case, in Law and Tactics in Jury Trials, by Busch and against a reference book commenting on the non-admissibility in evidence of negotiations for settlement prior to trial. During direct testimony, the appellant was prevented from reading com-

ments on various pertinent ethics from Legal Ethics, by Drinker, Columbia Press.

During the trial, the court prevented the appellant from testifying as to the various sources appealed to for legal assistance such as qualified counsel or expert witness or for research and the nature of such refusals.

The trial court questioned the appellant, as though in stern cross-examination, concerning the non-payment of fees to the appellee.

The trial court also questioned the appellant, in like manner, as to whether he did not know that the appellee could not withdraw as counsel during the trial although he was reminded that the issue was withdrawal as the appellee determined to himself to break both promise and implied promise to perform—assumpsit and implied assumpsit.

The trial court prevented the admission into evidence of the identical copy of the sales contract that the appellee had sought to enter into the basic trial in Baltimore.

The trial court, after admitting into evidence for the appellee an opinion and order of the trial judge in which he commented favorably upon the professional performance of the appellee during the trial, and reported as U.S. v. 72.71 acres etc., John C. Webb et al., 157 F Supp. 401, closed the door to the appellants as they sought to enter subsequent opinions and orders in which the same judge modified the prior opinion given as he was first denying a new trial to the appellants. These later decisions are reported as 23 FRD 435 and 167 F Supp. 512.

The appellee, in direct and during cross-examination, testified to the following:

he had never worked so hard or so long in any case before:

he prepared neither brief nor case law for pre-trial or trial, in fact, never did in any case;

he was not obligated to question any witness that the appellants did not bring to his office, important though their potential testimony was to the cause he had contracted to defend, and had committed himself to develop and use;

he did not prepare for pre-trial through reading Rule 16 on pre-trial, FRCP, nor any commentary of text on the subject and did not know what to expect at the pre-trial hearing. He demonstrated that he had not familiarized himself with the process in the three years intervening although advised by interrogatories that the appellants placed great importance on his lack of such knowledge; and

he did not familiarize himself with Rule 71(a), FRCP, that would have given the appellants a method of settlement short of trial.

Given information concerning the sale of Hadley, adjacent to the appellants, at $700 an acre prior to the landtaking of the appellants' land, rather than at $517, after the landtaking, as indicated by the recorded deed, by men who made such purchase an investment rather than speculation, the appellee took no steps for the reconsideration of the appraisal of the appellants nor for use of such testimony by any measure of discovery or for admission of such information as admissible hearsay evidence.

During the basic trial, he failed to object as the trial court prevented the expert witness for the appellants, E. L. Dieudonne, from testifying on the reasons why Hadley farm was the key comparable and why and how he had arrived at his appraised figure of $43,000 as just compensation.

Although the appellee claimed he had won over the judge who presided at the pre-trial to barring the use of negotiations for settlement before the trial as testimony during the trial, he abandoned the victory. Reverting to his fears, again without warning the appellants, he prevented the appellant from testifying, as he fully intended to testify and for which he had fully prepared himself to do, as to the radical improvements to be made to Snouffer School Road. The appellee compounded such injury, after the charge to the jury, by advising the trial court that the road was really a gravel road rather than dirt. Concerning his evaluation of the concern of the appellants about the importance of Snouffer School Road as an issue at the trial, the appellee stated on cross-examination "You just kept on talking about the Snouffer School Road. That is all I heard there when I would see you."

The jury awarded the appellee his claimed fee in full, with interest, or $1,130. The judgment entered was in favor of the appellee, with interest and costs. (P.E. 5)

The appellants filed their notice of appeal on December 2, 1960, and appeals briefs on April 20, 1961. The questions raised were those raised in this petition, including jurisdiction. After the hearing the Court of Appeals for Maryland filed an opinion overruling the appeal on August 17, 1961.

Notice of appeal to the Supreme Court of the United States was filed in the Court of Appeals of Maryland on September 17, 1961, which Court issued a stay of Mandate in the case on September 22, 1961.

On November 2, 1961, a second petition for relief from final judgment in Civil Action No. 8628 was filed in the U.S. District Court for the District of Maryland. Petition was submitted on the basis of testimony given or provided

for the trial below. Petition cited testimony supporting the claim of "fraud upon the court" and of the "absence of due process."

After hearing the petition, an overruling opinion and order was filed on January 3, 1962. (p. 42)

Questions Are Substantial

This appeal raises basic and fundamental questions on public policy concerning the degree of professional competence, performance and knowledge required of counsel who are members of U.S. Courts and the attending responsibility therefore of those courts.

May a trial court avoid the responsibility to require the degree of adequacy of its members and to ignore the causal relationships between the degree of demonstrated competence and resulting findings in a judicial proceding?

May the responsibility of a U.S. court to maintain the adequacy of performance of members of that court be assumed by a court not having jurisdiction over the basic subject matter or cause, nor possessing the means or desire to correct such inadequacies and which may even be antagonistic in its actions concerning the various steps for improving court performance as adopted by the Judicial Conference of the U. S., the Administrative Office of the U. S. Courts or any other agency or office having responsibility and authority to determine the manner in which the business of a U. S. court shall be conducted?

May such an alien jurisdiction, in undertaking such responsibility, ignore in its deliberations and findings and indeed, in its findings, go contrary to determinations by this or other U. S. courts in similar situations or circumstance?

Arguments for Granting Writ

Question (1) *Jurisdiction not in state but in federal court.*

The case here appealed is properly and ought to be under the exclusive jurisdiction of the U. S. District Court for the District of Maryland where the basic trial was held. Such jurisdiction follows from both statute and from ancillary jurisdiction.

The case qualifies as a federal matter under Title 28, section 2072, which places power for prescribing the manner of operation in civil actions of district courts under the Supreme Court. This power is not shared in any degree by the Circuit Court of Maryland for Montgomery County nor in the Court of Appeals of Maryland. In the absence of such power the case ought not to be considered by them.

The appellee testified that he was unfamiliar with both Rules 16 and 71(a), FRCP. The former, governing pre-trial, is recognized as the most popular of all the rules in FRCP. Unread at the time of pre-trial, it remained unread at the time of trial in the court below, over three years after the need therefore.

The Federal Rules for Civil Procedure became effective after Congress had considered the implications of their adoption with respect to familiarization therewith of lawyers operating more frequently under the rules of a state or other jurisdiction.

The published hearings of the House Judiciary Committee March 1-4, 1938, have this exchange:

"Mr. Ramsey: Mr. Attorney General, should not the pleading that is used in the Federal Courts be for the benefit of those in the same or other state? In other words, is not a lawyer who goes into Federal Court who is a resident

of the district or State, much more familiar with the practice there than he could be with this practice?

"Mr. Cummings: I think it is entirely an erroneous assumption, Mr. Ramsey. I think this is an understandable procedure, and I believe there are lawyers in West Virginia, I may say so, that do not understand the practice of West Virginia, even now. But no lawyer of competence can fail to understand this practice, with just a little consideration or study."

The appellee, without experience in such federal matters neither considered or studied the pertinent rules prior to performing for the appellants nor in the three years thereafter. There was no professional gain to him by reason of experience as measured by increased knowledge of the rules under which one operates in a federal court. Nor was there a gain in the court of his regular practice since it denies pre-trial, as evidenced by the repeated denial thereof to the appellants, where an evident need therefore was stated prior to and demonstrated during the trial below.

There is scant need to call attention of this Court to the beneficial effects of pre-trial upon the expedition of case settlement. This has been attested to by the manner in which the accumulated case backlog in the Brooklyn District was quickly resolved by designed experimental use of pre-trial. There, adequate development of briefs in readiness for scheduled pre-trial resulted in reported realistic settlement objectives.

More recently, the Handbook of Recommended Procedures for the Trial of Protracted Cases, developed and propagated by the Judicial Conference of the U. S. Courts, observed upon the seepage of litigation to settlement in administrative channels. There is also seepage through non-settlement, the endurance of what may be considered

unjust but for which the channels of correction, through litigation, are too tortuous and results too unpredictable.

With declaration for allegiance to trial by adversary, the growing emergence of the spirit of science in the courts is evidenced. Judicious use of pre-trial is required or recommended with judicial attention directed to the requirement that non-pertinent detail be eliminated and the facts revealed through adequate use of discovery, as such, be developed in subsequent pre-trial. Thus is accepted judicial responsibility for adequacy of fact through the requirement of adequate discovery on the part of counsel of record.

Besides the interest of the federal judiciary in the increased development in the development of fact and ability in its use, the Nation has a substantial stake in developing this capacity. It is estimated that $2,400,000,000 was the investment in operating costs for higher education in 1957-58. The estimate for public elementary and secondary education in 1961-62 is more than $18,000,000,000 for both operating and capital charges.

This trend towards adequacy of discovery and judicial responsibility therefore was foreseen by Dean Pound in his address to the ABA in 1906 and of Judge Vanderbilt in the preface of Federal Practice and Procedure by Baron & Holtzoff. Einstein is reported to have said that science is the product of "divine curiosity." His discovery of the theory of relativity followed from curiosity developed by the observation of a variation of actual from predicted performance. Scientific prediction is based upon an adequate accumulation of fact and their interpretation in the light of past events.

The appellee acted in rebellion to the development of pertinent and potentially vital fact through any measure of discovery. He testified and demonstrated that he was in

opposition to his client, a position which is also in opposition to the trend in the courts of the United States. What then becomes of "due process" in the fairness of hearing in a court of the U. S. where counsel secretly rejects the development of facts when only he knows, or should know, the legal steps of discovery and use of discovery as admissible evidence.

The issue of "due process" is not downed by the most recent order and finding of the federal trial court and its constitutional overriding under the 5th Amendment to the availability of newly discovered evidence under Rule 60(b) FRCP.

Neither, as an administrative matter under statute 28, section 2072, can it be overlooked that by avoidance of meeting the issue of adequacy of legal representation for the appellants in the underlying trial in his court, there has resulted a total of three opinions and orders from that court, three actions from a U. S. Court of Appeals, two declinations to accept a petition for certiorari by this Court—eight actions thus far in U. S. Courts with more indicated before a result can be obtained within a U. S. Court by the appellants that will bear the scrutiny of actual developed fact against predicted result as arrived at by jury trial.

This result, compared to the expenditure of some $20 billions with educational institutions free from vexatious wrangling and appeal, standing the continued scrutiny of institutions, responsible administrative agencies of government, the General Accounting Office and the Congress, over a period of twenty years, show that much progress remains to be made in even such a simple matter as eminent domain that may be treated more simply with scientific measures of determination and discovery than more complicated issues. Is the answer not an increase of re-

sponsibility upon the trial court for the adequacy of professional competence and of developed fact in a degree commensurate with his exercise of authority over the trial?

The case was *ancillary* to the basic cause despite the finding of the Court of Appeals that there was disqualification therefore by reason of a difference of matter and parties, no difference of citizenship nor other federal question and exclusive federal jurisdiction involved.

It is stated in 36 CJS "Courts," section 13(1) that "since ancillary jurisdiction exists by reason of the relation of the ancillary proceeding to the main suit, ancillary jurisdiction is not dependant upon the amount in controversy in the ancillary suit or proceeding, or on a federal question being included therein, and it exists irrespective of the citizenship of the parties, or in the presence of any other factor which would ordinarily determine federal jurisdiction." See also Federal Practice and Procedure, section 23, "Ancillary Jurisdiction."

Similarly, in section 13(4), with respect to Wallace v. Fiske CCA and 80 F 2nd 897, it was quoted that "(1) Where court of equity retained jurisdiction of parties and subject matter—court had jurisdiction to make such an award at any time. (2) Where federal court of equity retained jurisdiction of parties and subject matter of suit—, it had jurisdiction of ancillary proceeding for counsel fees, notwithstanding attorney and some remaindermen were residents of the same state. (3) Where entire trust fund was brought into court of equity and chancellor was clothed with power to make orders incident to its administration, parties were not misjoined in ancillary proceeding for counsel fees against remaindermen notwithstanding their interests were in some respects distinct and separate. See also Yuba Consolidated Gold Fields v. Kilkeary, et al., 206 F. 2nd 884.

It is held that the federal trial court continued to have control of the judgment against which the appellee had sought a lien and from which the appellants offered to make payment in full settlement. Subsequent withdrawal of such funds as advance payment, by court order, did not cancel the control of these funds by the court.

The subject matter was the same in which the appellee claimed common interest with the government, namely that the claim or appraisal of $43,000 was excessive and that his professional performance was of high order. If his inadequacies were such as claimed by the appellants and demonstrated by his testimony, lack of due process guaranteed by the 5th and 14th amendments to the Constitution require that a new trial be granted.

"Subject matter" is defined in Words and Phrases as "the thing in controversy." In this instance it is the fairness of the federal trial experienced by the appellants in the light of the performance of the appellee as counsel.

Finally 21 CJS section 85 states "If the court has not jurisdiction of the cause of action or subject matter involved in a particular case, such jurisdiction cannot be conferred by consent, agreement or conduct of the parties." The subject matter concerns a federal proceeding in eminent domain in which the state has no jurisdiction and can not in the ancillary proceeding.

Reference is also made to 7 CJS, section 18(b), 732, which states "Of course the court in which a lawyer commits unprofessional acts has jurisdiction notwithstanding the attorney lives in another jurisdiction."

Question (2) Denial of right to cross examine the appellee against any legal text, reference or ethic.

Basic to the determination of the causal nature of the

performance of the appellee as solicitor and as barrister for the appellants in the inacceptance and rejection of Hadley farm as the key comparable by the federal jury, was the right to test the expertness of the appellee against an objective standard. As a result of the "conspiracy of silence" by the legal profession to prevent expert testimony in the case, it was absolutely necessary to test his preparation for and performance in the trial against some objective standard such as a recognized and established legal text, reference or ethic in such matters. Under the repeated rulings of the trial judge in the case below, and as affirmed by the Court of Appeals of Maryland, such cross examination or testimony was denied to the appellants. Thus the question is raised in an action, in which negligence and causation are central, whether cross examination of a legal expert upon recognized and established texts, references and ethics in the field in which he has testified is germane, whether or not he has read, relied upon, or is bound by such publication.

The trial court committee prejudicial reversible error, as did the Court of Appeals below, in precluding the appellants (defendants below) from cross examining the appellee (plaintiff below) against such publications on legal matters.

60 ALR 2nd 77 (1958) footnote 8 at 80 reads "There is presently operating, as part of a general impulse towards the liberal reception of all relevant evidence, a trend towards permitting the resort to the treatises in most cases where an expert has testified. Indeed, the drift is towards the acceptance of treatises even as primary evidence."

Texts employed merely to test the integrity and expertise of witnesses, they are not hearsay as used. In any

event, that evidence may be hearsay does not, ipso facto, require its conclusion. Whether its reliability is otherwise established or good reason exists for its admissibility and it will be admitted under one or another of the many exceptions to the hearsay rule. And so with a legal text book, if the text is a recognized one, there is no valid reason to exclude its use on cross examination merely because it may be technically hearsay. See also Ruth v. Fenchel, 21 NJ 171, 121 A 2nd 373 (1956).

In Abrams v. Gordon, 276 F. 2nd 500, the USCA, DC., ruled in a pertinent per curiam decision, written by Prettyman, CJ, and participated in by Mr. Justice Reed, retired, and Edgerton, circuit judge.

"Both negligence and causation were in issue. The court prevented the plaintiff from cross examining expert witnesses, who had testified for the defense on causation, concerning any statements in texts which the witnesses had not relied upon or read. We think the court erred. Reilly v. Pinkus, 338 U.S. 269, 94 L Ed 63; Dolcin Corp. v. Federal Trade Commission, 94 U.S. App. DC, 247, 219 F. 2nd 742, cert denied 348 U.S. 981. "The object in using the books on cross examination was to test the expert's testimony by having him refer to and comment upon their contents, 338 U.S. at 276. The court's bar was against all books, however reputable, which the expert witness had not relied upon or read. In view of this ruling, it was not necessary for the appellant to show these particular books were authoritative. We cannot say the court's error was not prejudicial.

Reversed"

This decision, in hand, was called to the attention of the trial court at the time of his ruling which prevented the cross examination of the appellee against Chapter 11,

"Preparation of the Case," in "Law and Tactics in Jury Trials" by F. X. Busch. There was rejection of the precedent by the court without scanning.

The decision was again cited as precedent, to the Court of Appeals, for assigning reversible error to the trial court. The Court of Appeals failed to consider the opinion cited or failed to cite reasons for its inapplicability to this case in its subsequent overruling opinion of the appeal.

Therefore, the state trial court and the Court of Appeals for Maryland, in affirming the acts of the trial court in the matter, decided what is in essence a federal question at variance with applicable decision by this Court and thereby committed reversible error.

Question (3) *Did the trial court (Pugh, J.) show prejudicial bias when*

(a) *the trial court refused to permit the appellant to testify as to the various sources appealed* to for legal assistance in finding competent counsel, expert witnesses or other aid to their cause and the nature of their refusal. Recital would have shown that the federal trial court, the state circuit court, and the Montgomery County Bar Association had each individually failed to meet their responsibilities with respect to the maintenance of adequate professional competence among members of the court or bar and the Bar Association itself in its responsibility to recommend for judgeships only those eminently qualified for that office so critical to the maintenance of rule by law in accord with the Constitution in this country. It is public knowledge that the Bar Association had included the name of the appellant among those recommended for the identical judgeship occupied by the trial court (Pugh, J.).

There was a conspiracy of abstention from assistance

participated in by vote of the Board of the American College of Trial Lawyers, deans and faculties of law schools in the metropolitan area, and by competent practitioners in court who barred themselves from protecting the courts against inept and untalented lawyers.

With an official record of competence in the selection of personnel subsequently performing with distinction in the areas of public administration, using both the past record of nature and quality of work performed, and, in the institution of the first group to function as comptrollers in the Navy which group assisted largely in there being a cadre of trained Reserves in being and available as the Korean conflict broke, in the selection of which an objective determination of needed talents was used for the first time in selection of Naval personnel for a program assignment (it is understood), the appellant demonstrated a contrasting inability to select counsel for eminent domain proceedings on the basis of the only advertising media available to lawyers—status. The possession of pertinent legal experience proved of no assistance in selection for achieved or predictive of skills.

Only long after the need for counsel was greatest, was a talent revealed whose absence indicates probable ineptness in trial work and presence augurs probable facility and skill. This talent is the ability to evaluate visually and mentally the relation in space of one point with respect to another.

Competent trial lawyers, in general, had this talent as indicated by various activities which required such talent for excelling. Such activities were successful training as pilots, ownership of a plane, ability of high order in geometry as compared with algebra, tournament skill in tennis, skill as an open field runner or quarterback in football,

productiveness in biological research, invention of machinery or its design, architecture and community planning. Difference in possession of this talent makes for difficulty, even impossibility, of communication between individuals.

That this talent may be a critical factor in determining capacity for trial work either as barrister or judge, is a hypothesis shared by Dr. Leonard Carmichael, head of the Smithsonian Institute, in the District, and Lord Justice Patrick Devlin of the Court of Appeals, House of Lords, England.

Professor W. T. Morgan, Harvard Law School, has stated that with certain revolutionary procedural changes, the U. S. could dispense with half of its lawyers. Dean Pound was optimistic about the relative improvement to be expected to the capacity of our courts to dispose of cases as the new rules for federal and civil procedure were instituted. It is interesting that, educators each, they ignored the importance of differences in selection, education and training between solicitors and barristers and of the importance for the initiation and continuation of designed research as an important element in the improvement of the juridical process.

A preliminary and tentative statistical study indicates that a divided bar, or something approximating such, is required to discourage the untalented from trial work, with attending improvement of performance achieved in the juridical process. It would appear (p. 46) that a reduction of about 100,000 lawyers could be made with an annual saving to the economy of about $500,000,000. In England and Wales, there was in 1958 one barrister for a population of 21,000 and one solicitor per 2,000 or one lawyer per population of 2,100. In this country, in 1950, there was one lawyer per population of 830, each of whom was entitled to appear as an attorney of record.

The impossibility to obtain competent assistance in the trial below, forced a decision on the jury itself as to what quality of legal representation should be required in the County. Such responsibility required consideration, that the award did not reflect, indicating the prejudicial nature of the action by the trial court in barring recital of the various agencies and individuals who would not respond to the needs of the profession and Court, far exceeding the needs of the appellants in the matter. The denial of such information to the jury was prejudicial error.

b. *when asking the appellant, while a witness, in stern cross examination, as to whether he had paid anything to the appellee?* This is a case both of applied and implied assumpsit. Corbin on Contracts, section 6, states "In the case of an executory contract, a refusal to perform any obligation thereunder, and the defense of an action brought thereunder are all that the defrauded party can do by way of asserting his right to disaffirm the contract; and, unless his silence or delay has operated to the prejudice of the other party, he may first assert his right when his adversary asserts his claim by action. Robert v. Jones, NJ 85 A 244, 83 NJL 492. The court ignored that the appellants had offered to pay if the federal court accepted jurisdiction and determined on the basis of the record and statements of the appellants the amount that was owed the appellee. Also ignored was the condition imposed by that authority in his opinion and order that full judicial procedure was required. The trial below was that proceeding and any delay in payment beyond the hearing of September 19, 1958, was a delay inherent in the juridical process, most of that delay being 22 months in the Circuit Court itself.

Such questioning, and the nature of it, was prejudicial error countenanced by the Court of Appeals in its opinion.

c. *in questioning the appellant in similar tenor*, while

a witness, as to his knowledge that the appellee could not withdraw from the case during trial? Ignored by both the trial court and the Court of Appeals was the contention that the appellee was bound to withdraw at the moment he determined to break his agreement with the appellants to determine what degree of compulsion entered into the sale of various farms that were bound to be used as comparables by the government. Such determination could have been made by interviewing Messrs. Forest Walker, Clyde Thomas and McKendree Fulks. No such discovery, nor any other, was attempted and the status of all comparables used by the Government went by default at the trial. Neither was the appellant used, as he intended to be used, as the witness in his own behalf on the improved status and scheduled improvement, including paving, of Snouffer School Road. Corbin, on Contracts, section 17, states under implied assumpsit that the term is used to indicate that the party in question is under a legally enforcible duty, just as he would have been if he had in fact made a promise. By his ignoring the position of the appellants that the appellee was bound to withdraw as he determined not to observe promises, real or implied, in his preparation and presentation of the case, he became legally liable in the absence of withdrawal. Under ethics of the situation, Stryker in the Art of Advocacy (p. 24) says "What your client wants done, however, may be so fantastic that you are unwilling to stake your reputation on a course so helpless. In such a case you will say to him "I will return your retainer to you. The thing for you to do is to engage a lawyer who agrees with you."

By ignoring the contention of the appellants and the establishment that the appellee could not withdraw while in the court room itself, the trial court and the Court of Appeals in affirming the court's action committed prejudicial error.

d. *in denying the admission of a sales contract* as an exhibit by the appellants? Despite the position of the Court of Appeals that no such denial occurred, the record shows that the trial court examined the document as the appellant (while witness) handed it to him for inspection. The trial court stated that it was "only a copy", passing it to the court stenographer. The court had previously explained to the appellant that, under Maryland Rules, when he prevented the appellants from doing anything, an appealable objection was automatically registered thereby. By his actions, the trial court dismissed the document as being either useable or important to the jury's considerations. Ignored by the action was the contention of the appellants that the appellee, in his endeavors to introduce the document into the basic trial, was bound to know that the document was hearsay evidence and was responsible for its adequate introduction as evidence under the various exceptions to the hearsay rule as a contract of a completed sale. Such knowledge and professional competence were central to the issue of the trial. The trial court did thereby, as did the Court of Appeals in its affirmation, commit reversible prejudicial error.

e. *in denying the admission into evidence*, certain opinions and orders of the federal trial court that were pertinent to determining the professional quality and timeliness of actions by the appellee? Such opinions and orders made comment that modified the statement that the appellee had performed with professional skill and credit during the federal trial. The trial court below, after admitting the first opinion and order for the appellee, closed the door as the appellants sought their turn to enter the subsequent opinions where the federal court modified his original order in further denying new trial to the appellants. By such denial in the trial court and affirmation by the Court of Appeals, reversible prejudicial error was committed.

Question (4). Did the Court of Appeals err in finding that the verdict and judgment in the trial court below were not contrary to the evidence by reason of lack of timely motion therefor by the appellants during the trial?

The Federal Rules for Civil Procedure became statutory law following a hearing in both the House and the Senate before the judiciary committees. The House Report, No. 2743 of June 13, 1938, says, in part: "It is confidently expected that the adoption of the new rules will materially reduce the uncertainty, delay, expense, and the likelihood that cases may be decided on technical points of procedure which had no relation to the just determination of the controversy on its merits."

It is argued by the appellants that the action of the Court of Appeals, taken alone, would decide the case upon a technicality and not upon the merits of the case as set forth in the record before it. Such act is contrary to the intent of the Congress as reflected in the above quotation. It also disregards the provisions of the 14th Amendment concerning the prohibition of the enactment or enforcement of any state law that deprives any person of * * * property without due process of law. Due process requires fairness of a hearing. Judicial knowledge of what constitutes professional competence for an attorney of record would require dismissal of the suit of the appellee by the trial court, and, by the testimony of the appellee alone, by the Court of Appeals, without motion to the court, on the basis of fairness. The failure of the Court of Appeals to so recognize a responsibility to thus perform, or if to recognize and fail to act by reason of Maryland Procedures of Law, is to act contrary to the provisions for a fair trial contained in due process required both by the 5th and the 14th Amendments to the Constitution.

Brief comment is made on observation made by the

Court of Appeals in Appendix A and by federal trial court —Appendix B.

The former gives much attention to the letters written by the appellants, in termination of services, to the appellee. These were known to the federal trial court in denying a motion for a lien as attorney's fees against judgment.

In face of an expressed willingness to pay in full by the appellants whatever he said was due, he still indicated a full judicial procedure was required. The central issue, then, was adequacy of appellee and not the letters written by appellant prior to learning that there was indeed negligence and "causation" on issue.

Also the court of appeals in commenting that a witness for the appellants, a Montgomery County lawyer, had testified that in his observation at the trial, he considerd the appellee had "done a very good job." Ignored is the fact that the lawyer had joined the appellee in suit against the appellants for a lien against judgment. Also, he had brought suit in the County Court—Custer and Seegmiller v. the Webbs, No. 8406 Law, and that trial Judge Pugh, at the bench, had assured appellants that the suggested settlement of fee did not preclude or impair a suit for negligence. He was called by the appellants, to be questioned as a hostile witness. This right was denied. His endorsement then stood unchallenged.

The federal trial court ruled, in Exhibit B that no new evidence was included and that the time limit of one year from judgment for the introduction of new evidence and appeal charging fraud had expired for each. In the petition overruled, the appellants contended lack of "due process" and "fraud upon the court" were the issues. For each, real evidence was advanced. In 23 FRD 635 on the same material, there was only hearsay evidence on which, it is under

stood, no new trial is ever granted. This may be the reason the federal trial court ignored, with no comment, the arguments advanced in the first motion for relief from final judgment under Rule 60(b) "for any other reason" that the federal trial jury never heard the real case of the appellants.

CONCLUSION

For the reasons stated and the questions presented by this appeal which are substantial and are of public importance, it is respectfully submitted that probable jurisdiction should be noted.

JOHN C. WEBB
Appellant
Pro se
RR #1, Box 225
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301-948-2510

JOHN C. WEBB AND
HELEN H. WEBB,
Appellants

APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

No. 342

September Term, 1960

JOHN C. WEBB and HELEN H. WEBB,
His Wife

v.

JOHN E. OXLEY

BRUNE, C. J.
HAMMOND
PRESCOTT
HORNEY
SYBERT,
JJ.

Opinion by Sybert, J.

Filed: August 17, 1961

John E. Oxley, appellee, a Montgomery County attorney, was retained by John C. Webb and his wife, Helen H. Webb, appellants, to represent them in a land condemnation proceeding filed against the Webbs by the United States Government in the District Court of the United States for the District of Maryland in December, 1955. The record shows that Mr. Oxley is a reputable lawyer of 35 years' experience in general practice, including extensive trial work. He testified that he agreed to represent the Webbs after assuring himself that the Webbs' previous attorney was "no longer in the case," and had been discharged by them. In March, 1957, the parties agreed to a retainer and contingent fee arrangement under which Mr.

Oxley should receive, after conclusion of the case, a flat fee of $500.00 and in addition 20% of any amount obtained in the suit for the property in excess of $9,750.00, the figure already offered to the Webbs by the government. The $500.00 fee and expenses of litigation were to be deducted from the excess of the jury award above $9,750.00, before computation of the contingent fee.

The three day trial of the condemnation case was held on October 22-24, 1957, in the District Court. The jury's award for the property was $14,000.00, a figure far below the Webbs' asserted valuation of about $43,000.00.

Mr. Oxley was then discharged by the Webbs by letter dated October 26, 1957, in which Mr. Webb assured Mr. Oxley that "We do appreciate the work you have done for us and this action is not meant in any way to indicate a lack of confidence." The Webbs then retained other counsel to prosecute a motion for a new trial and an appeal to the United States Court of Appeals, both of which were unsuccessful.

There was subsequent correspondence between Mr. Oxley and the Webbs concerning the fee. On December 4, 1957, Mr. Webb, in a letter to Mr. Oxley, listed the expenses of litigation and computed the contingent fee due Mr. Oxley, over and above the flat fee of $500.00, as $448.00. He then stated: "This makes a total due you of $948.00. The question of a new trial has not been determined as yet. If a new trial is not taken, your fee will be forthcoming as the award is received. If a new trial is awarded and taken, the payment will be further delayed." In none of the correspondence appearing in the record is there any suggestion of dissatisfaction on the part of the Webbs with the competence of Mr. Oxley's representation of them.

After the Webbs lost their motion for a new trial and appeal, and received from the clerk of the District Court the $14,000.00 awarded by the jury, but did not pay his fee,

Mr. Oxley sued the Webbs in assumpsit in the Circuit Court for Montgomery County. At the jury trial Mr. Webb, who is not an attorney, appeared in proper person. A jury verdict in favor of Mr. Oxley for $1,130.00 resulted, the full amount of the fee plus interest. Mr. and Mrs. Webb appealed from the judgment entered on the verdict.

The brief filed by Mr. Webb on behalf of himself and Mrs. Webb is inartificially drafted and discursive. Stated concisely (relatively speaking), the contentions presented therein appear to be as follows: (1) That the Circuit Court for Montgomery County did not have jurisdiction to hear and determine the case; (2) that the trial court erroneously sustained objections to appellants' attempt to prove negligence in the performance of a contract for legal services by asking appellee if he had ever read certain legal textbooks; (3) that the trial court erred by demonstrating prejudicial bias (a) in refusing to allow testimony by Mr. Webb concerning "the various sources that refused assistance in the location of lawyers qualified to serve as counsel or expert witness or other aid in this case"; (b) in asking Mr. Webb, in the manner of "stern cross-examination", certain questions relative to the non-payment of the fee to Mr. Oxley, and in ignoring the contention of the Webbs that Mr. Oxley had, prior to the trial of the condemnation case, without informing the Webbs, determined not to allow the trial strategy agreed upon by Mr. Oxley and Mr. Webb, and that therefore Mr. Oxley should have withdrawn from the case prior to trial; (c) in excluding a certain exhibit which appellant sought to introduce; and (4) that the verdict and judgment were contrary to the evidence.

The question of jurisdiction was not raised by appellants in the trial court. However, matters of jurisdiction are always before this Court and are exceptions to the general rule that we will consider only such questions as have been raised and decided below. Maryland Rule 885. *Berlinsky v. Eisenberg*, 190 Md. 636, 59 A. 2d 327 (1948).

The appellants maintain that the United States District Court had exclusive jurisdiction to determine the amount of Mr. Oxley's fee, on the ground that it was a matter ancillary to the condemnation case. The so-called "ancillary jurisdiction" rule is a concept enunciated by the federal courts by which it is held that a district court acquires jurisdiction of a case or controversy as an entirety, and hence may, as an incident to disposition of a matter properly before it, possess jurisdiction to decide other matters raised by the case of which it could not take cognizance were they independently presented. The rule and the cases upon which it is based are analyzed by Barron and Holtzoff in 1 *Federal Practice and Procedure* (Rules ed.) §23. See also 36 C.J.S., *Federal Courts*, §13(2). From the authorities it is plain that the rule has no application to a situation such as the one before us. The rule does not purport to confer *exclusive* jurisdiction upon the federal courts in ancillary matters not otherwise within their jurisdiction.

Basically, the suit before us is not ancillary to the condemnation case. In *Cooperative Transit Co. v. West Penn Electric Co.*, 132 F.2d, 720, 724, (1943), the Circuit Court of Appeals for the Fourth Circuit quoted with approval from *Simkins on Federal Practice*, §745, as follows:

> "'If the bill contains matter not before litigated by the same parties standing in the same interests, that is, if new parties are brought in, and new matter charged as a basis of relief, then the bill is not ancillary, but an original bill, and cannot be supported by the former suit, but must stand independently on its parties and subject-matter for jurisdiction in the Federal courts.'"

See also, to the same effect, *Karnegis v. Schooler*, 57 F. Supp. 178 (D. C. N. D. Tex. 1944). Here, the parties in the condemnation case and the instant case are different, and the matter of Mr. Oxley's fee is "matter not before litigat-

ed by the same parties standing in the same interests," but is a separate and distinct cause of action which must be asserted like a claim arising upon any other contract. See *Ashman v. Schechter*, 196 Md. 168, 176, 76 A. 2d 139 (1950). In addition, there is no diversity of citizenship in the instant case, nor does it involve a federal question. Clearly, the Circuit Court for Montgomery County had jurisdiction of the subject matter of the instant suit, Code (1957), Art. 26, §30, and had jurisdiction over the defendants, who are residents of that county, Code (1957), Art. 75, §75.

The second contention of appellants apparently refers to a series of questions Mr. Webb propounded to appellee on cross-examination, seeking to establish Mr. Oxley's negligent handling of the condemnation case by attempting to show his unfamiliarity with certain legal textbooks on trial tactics. The trial court sustained appellee's objection to this line of questioning, commenting, "There must be hundreds of textbooks on how to try cases, but that does not mean you have to follow them." We, too, fail to see how such questions were material. Unfamiliarity with certain legal texts would not prove negligence on the part of Mr. Oxley in handling the Webbs' case. Where matter sought to be elicited is immaterial it can hardly be said to be prejudicial to the complaining party to refuse to let it in. *L. & S. Const. Co. v. Bradbury Homes*, 208 Md. 476, 118 A. 2d 681 (1955); *Md. & Penna. R. R. Co. v. Knight*, 122 Md. 576, 582, 89 Atl. 1091 (1914). Since the Webbs suffered no prejudice from this ruling by the trial court, even if it were erroneous (which we do not find), it was harmless error and not ground for reversal. *Rippon v. Mercantile Safe Dep.*, 213 Md. 215, 131 A. 2d 695 (1957); *L. & S. Const. Co. v. Bradbury Homes, supra*.

The contentions set forth in appellants' third argument are indefinite and fail to refer to any appropriate portion of the record as indicating bias or error on the part of the

trial court. What specific rulings or actions are being challenged must largely be a matter of speculation.

(a)

We fail to see the relevancy of testimony offered by appellants to show difficulty in acquiring legal representation or aid in the instant suit. At one point in the record an objection to such testimony was sustained by the trial judge on the ground that such evidence would be immaterial. We find no error in this ruling. See *Kennedy v. Crouch*, 191 Md. 580, 585, 62 A. 2d 582 (1948).

(b)

Inspection of the record reveals no bias or error with respect to the substance of questions propounded to Mr. Webb by the trial judge or the manner in which they were asked. Under the circumstances, a great deal of guidance on the part of the trial judge was necessitated by the lack of skill of appellants in presenting their own case, in order that the issues could be fairly delineated and considerable immaterial and irrelevant material excluded. The record discloses no instances of "stern cross-examination" by the trial judge. He gave Mr. Webb great latitude while testifying and examining and cross-examining witnesses. The record shows that Mr. Webb gave the jury at length his version of why he hadn't paid Mr. Oxley and why he thought the latter departed from agreed strategy. If any of the judge's remarks and questions were prejudicial (which is not apparent), the failure of appellants to object to the questions or move for a mistrial constituted a waiver, and this matter cannot be reviewed on appeal. See Maryland Rule 885; cf. *Kujawa v. Baltimore Transit Co.*, 224 Md. 195, 167 A. 2d 96 (1961).

(c)

Appellants claim that the trial court improperly excluded an alleged copy of a sales contract on a farm located near the Webb farm, which Judge Chesnut had refused to

admit in evidence at the condemnation trial as relating to a property of comparable value. A painstaking examination of the record extract and the transcript shows that while the purported copy of a contract (which Judge Pugh found to be only a copy of an offer) was discussed at length before the jury, it was never actually offered in evidence, and therefore there is no ruling for us to follow.

The appellants finally argue that the verdict and judgment were contrary to the evidence. The record reveals that the jury had before it evidence sufficient, if believed, to support its verdict for the appellee for the full amount of his fee and retainer with interest. In addition to what has been said, a memorandum and order filed by Judge Chesnut in the condemnation case overruling the Webbs' motion for a new trial was placed in evidence below. In it that distinguished jurist remarked the condemnation case had been actively and well tried by Mr. Oxley. Likewise, a Montgomery County lawyer called to the stand by Mr. Webb testified that he had attended part of the condemnation trial and that in his opinion Mr. Oxley had "done a very good job" of presenting the case. However, we do not reach the question here presented since under the provisions of the Maryland Rules the question of the sufficiency of the evidence to authorize a recovery or to sustain a defense will not be reviewed on appeal unless the question has properly been presented to the lower court. Rules 522, 885; *Grier v. Rosenberg*, 213 Md. 248, 131 A. 2d 737 (1957). No motion was made by the Webbs for a directed verdict, which step would have preserved the question of review. *Excell v. Payne*, 199 Md. 73, 85 A. 2d 452 (1952); Rule 563.

Having found no error below we will affirm.

JUDGMENT AFFIRMED, APPELLANTS TO PAY THE COSTS

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA v. 72.71 ACRES OF LAND MORE OR LESS, IN MONTGOMERY COUNTY, STATE OF MARYLAND, AND JOHN C. WEBB, ET AL	CIVIL ACTION No. 8628

Filed January 3, 1962

CHESNUT, *District Judge*

In this federal land condemnation case Mr. and Mrs. Webb, the property owners, on October 2, 1961, filed a second repetitive motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure. At the trial of the case in this court in October, 1957, the jury, after visiting the land in Montgomery County, Maryland, filed a condemnation award in favor of the property owners in the amount of $14,000. The property owners by testimony of real estate appraisers as experts, claimed the value to be $43,000. A motion for a new trial was filed and overruled December 23, 1957, in a written opinion by this court. 157 F. Supp. 401. From this order the property owners appealed and the order of the court was affirmed. 256 F. 2d 669 (June 30, 1958), cert. den. 358 U. S. 931 (Jan. 12, 1959).

On October 10, 1958, the Webbs filed their first motion for relief from judgment under Rule 60(b).[1]

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[1] (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding, for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence

After full hearing and extended argument this motion was overruled in a written opinion by this court filed May 1, 1959, in which a detailed history of the prior proceedings in the case was set out. See 23 F.R.D. 635. Again an appeal was taken by the Webbs to the Fourth Circuit where the order of this court was affirmed per curiam January 18, 1960, 273 F. 2d 416; cert. den. 364 U.S. 818 (October 10, 1960).

A hearing and extended argument on this second petition was held some days ago. No new or additional evidence was submitted by the petitioners in support of the papers filed with the motion.

A comparison of the grounds now asserted for relief from judgment in the second petition will show that they

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1 cont'd:

which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., s. 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946; Dec. 29, 1948, eff. Oct. 20, 1949.

are in substance and effect substantially and materially the same as those heretofore advanced in the first petition for relief from judgment. The claim now again asserted in substance is (1) newly discovered evidence and (2) fraud. It will be noted that the rule provides that with respect to these two assigned grounds the motion must be filed within one year from the judgment, and also within a reasonable time. The present repetitive motion therefore was not filed within one year as required by the rule, and in my opinion also not within a reasonable time.

As I understand the argument of Capt. Webb pro se, special emphasis is put upon his contention now, which itself is not new, that the personally selected trial attorney, a Mr. Oxley, an experienced attorney from Montgomery County, Maryland, was not competent or did not make sufficient preparation for the trial of a land condemnation case in this court. As to this, it will be noted that from the prior history of the case as contained in the opinion of this court (23 F.R.D. 635) Mr. Oxley was discharged by Capt. Webb shortly after the rendition of the jury's verdict and he thereupon struck out his appearance in the case. It further appears, as stated by Capt. Webb in his recent argument here, that Capt. Webb had refused to pay Mr. Oxley's bill for professional services rendered in the case in accordance with their agreement therefor and that Mr. Oxley had thereupon sued Capt. Webb in the Maryland State Court in Montgomery County and had obtained judgment against him, after a jury trial before Judge Pugh, in the full amount claimed with interest. From the judgment entered thereon Mr. and Mrs. Webb appealed to the Maryland Court of Appeals where the judgment was affirmed in a fully considered opinion by Judge Sybert, reviewing in some detail the evidence in the record before them, 173 A. 2d 358. Capt. Webb in his argument here stated that he had applied to the Supreme Court of the United States for an extension of time for filing a petition for certiorari in that court.

As I find the present repetitive motion for relief from judgment under Rule 60(b) was not filed within the time provided therefor by the rule and because upon consideration of the averments of the petition explaining Capt. Webb's contention in extended oral argument, I find no substantial merit on either equitable or legal grounds to support the motion, I have concluded that this second repetitive motion must be and it is hereby overruled and dismissed this 3rd day of January, 1962.

W. CALVIN CHESNUT
U. S. District Judge

True Copy—Test:

WILFRED W. BUTSCHSKY, *Clerk*

By GARY SAPPERSTEIN, *Deputy Clerk*

APPENDIX C

COMPARISON OF STAFFING JURIDICAL PROCESS

ENGLAND AND WALES
vs.
UNITED STATES

	England and Wales	United States
Number of Judges		
allocation, federal and state		
Montgomery County, Md.		1.5[4]
authorized	150[1]	7
	150	8.5
Population	42,700,000[2]	300,000[5]
Population per judge	297,000	35,000.
Lawyers		Entire United States
barristers	2,000	
population per trial attorney	21,000	830
solicitors	17,000[3]	
population per solicitor	2,200	830
total	19,000	180,000[6]
population per lawyer	2,100	830

1 Source Brief to Counsel, "Henry Cecil," 1958.
2 " World Almanac, 1960.
3 " The American Lawyer, Blaustein, Porter, 1951.
4 " Annual Report, Proceedings of the Judicial Conference of the United States, 1959.
5 " Estimate from Economic Survey, Montgomery County, Maryland, Homer Hoyt Associates, 1955.
6 " Census, 1950.